



October 11, 2002

VIA FEDEX

Ms. Cori Rose  
Senior Project Manager  
U.S. Army Corps of Engineers – New England District  
696 Virginia Road  
Concord, MA 01742-2751

RE: Islander East Pipeline Project – Application No. 200103091  
Least Environmentally Damaging Practicable Alternative

Dear Ms. Rose:

Islander East Pipeline Company, L.L.C. ("Islander East") understands that the U.S. Army Corp of Engineers ("Corps") is conducting a Least Environmentally Damaging Practicable Alternative ("LEDPA") analysis as part of its review of the Islander East Section 404 and Section 10 Permit Application ("Application"). Islander East has reviewed the Guidelines for Specification of Disposal Sites for Dredged or Fill Material ("Guidelines") (40 CFR Part 230) used by the Corps in evaluating projects for a LEDPA determination. Under the Guidelines, the following three general criteria are used in the LEDPA evaluation:

- 1) the relative extent of the public and private need for the proposed activity;
- 2) the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity; and
- 3) the extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses in the areas of consideration.

Islander East offers the following analysis to support the premise that the Islander East Pipeline Project is the LEDPA.

***Relative extent of the public and private need for the proposed activity***

The public and private need for the Islander East Pipeline Project is set forth in Islander East's Application, which describes the purpose of the project and the specific market need that will be served. The project will provide an initial 260,000 dekatherms per day ("Dth/day") of capacity to meet the immediate gas supply needs of the Islander East customers commencing in 2003 and is of critical importance to the growing Connecticut, Long Island and New York markets. The Islander East Pipeline Project offers significant additional benefits:

greater diversity of supply; fully integrated market access between New York and New England; and enhanced operational flexibility. A unique feature of this project is that it provides a separate connection to the existing mainland natural gas infrastructure that significantly enhances the security and reliability of the Long Island and New York energy infrastructure.

The need for the project has been confirmed in two separate determinations by the Federal Energy Regulatory Commission ("FERC"), which has authority under the Natural Gas Act ("NGA") to regulate and determine the need for interstate natural gas pipelines. The FERC issued a Preliminary Determination ("PD") for the Islander East Project on December 21, 2001, in Docket No. CP01-384-000.

The PD found that the project is in the public convenience and necessity and the project will fill an immediate market need by serving expected growth in the Northeast market area, subject to an environmental review pursuant to the National Environmental Policy Act ("NEPA"). On September 19, 2002, the FERC, after carefully balancing its staff's environmental analysis with the required non-environmental policy considerations, along with the substantial commentary from participants in that proceeding, issued an Order on Rehearing and Issuing Certificate ("Order") for the Islander East Pipeline Project. Page 2 of the FERC's Order states that the Islander East Pipeline Project will "benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas for anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets". A copy of the Order is included as attachment A to this letter.

These determinations by the FERC are supported by the New York State Public Service Commission, which stated on page 2 of its comments on the Draft Environment Impact Statement ("EIS") in April 2002 that "diversifying the gas delivery system by selecting a route that is totally independent of the existing Iroquois Sound crossing will enhance the reliability of the energy infrastructure to Long Island". A copy of the New York Public Service Commission's comments is included as attachment B to this letter.

KeySpan Delivery Companies together with KeySpan Utility Services, L.L.C., the fuel purchasing agent for KeySpan's generating affiliates, also provided evidence for the public and private need of the project. The KeySpan Delivery Companies, which have a public service obligation to provide safe and adequate gas distribution services to consumers in New York City and on Long Island, have entered into precedent agreements with Islander East. As stated on page 3 of attachment C to this letter, KeySpan contends that the "construction of Islander East significantly enhances the reliability of the KeySpan Delivery Companies' distribution services."

***Practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity***

In the Draft EIS, FERC's environmental staff developed the ELI System Alternative based on the alignment of the Iroquois Eastern Long Island Extension Project ("ELI Extension Project"). The ELI System Alternative was identified as only being capable of carrying the natural gas volumes proposed by Islander East and not the volumes proposed by the ELI Extension Project. On August 21, 2002, the FERC issued the Final EIS for the Islander East Pipeline Project which described the ELI System Alternative as environmentally preferable to the Islander East Pipeline Project except for emissions. However, FERC's environmental staff carefully distinguished its comments on the premise that the ELI Extension Project would not be constructed and that it did not take into consideration Islander East's project purpose and need, i.e. flexibility and reliability of the interstate pipeline grid, competition, market need, and the underlying agreements for the Islander East project (FEIS, Page 4 - 6). FERC staff clearly stated that the FERC Commissioners "will take the alternative into account when it makes its overall decision on the proposal project." (FEIS, Page 5-1)

As enumerated in 40 CFR Part 230, Section 230.10 (2), an alternative is considered practicable if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" or otherwise the alternative could "fulfill the basic purpose of the proposed activity". The ELI System Alternative does not meet these criteria. The ELI System Alternative is neither reasonable nor practicable because it has not been proposed by any applicant. To be considered viable, the ELI System Alternative would also involve construction of additional facilities including a 10,000 HP compressor that are not proposed to be constructed by any applicant<sup>1</sup>.

Assuming for discussion purposes that the ELI System Alternative would be proposed by an applicant and could be constructed, it still cannot fulfill the purpose and need of the Islander East Pipeline Project; which is to provide up to 260,000 Dth/day of natural gas to energy markets in Connecticut, Long Island, and New York City by November, 2003 and to increase the reliability of natural gas delivery services to Long Island by installing a separate natural gas pipeline across Long Island Sound. Because the ELI System Alternative has not been proposed, it could not be constructed in time to meet the in-service date of

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<sup>1</sup> Iroquois currently has pending in a separate FERC proceeding the approval of a 10,000 hp compressor station in Brookfield, CT that is not part of its ELI Extension Project but is required to transport the 175,000 Dth/day of capacity for the ELI Extension Project. In considering the ELI System Alternative, FERC's environmental staff not only assumed that the Brookfield Compressor Station would be certificated and constructed but also recommended that another 10,000 hp of compression would be required to transport Islander East's volumes along the ELI System Alternative. These additional facilities are not included in the ELI Extension Project application or any other application.

November 1, 2003 required by Islander East's customers. Moreover, even though Iroquois received a PD on September 19, 2002 for its ELI Extension Project, Iroquois filed with the FERC a motion on October 4, 2002 requesting deferral of consideration of Iroquois' application (see attachment D). In addition, Iroquois in its comments to the Draft EIS (see attachment E) stated that "if the Islander East project is constructed, Iroquois would not consider building the ELI project." Consequently, there is considerable doubt as to when or whether the proposed Iroquois facilities on which the ELI System Alternative is partially based will ever be constructed.

Even more significant is that the ELI System Alternative does not meet Islander East's stated purpose of increasing the security and reliability of the existing natural gas pipeline system serving the New York markets by the installation of a second pipeline across Long Island Sound. The FERC stated on page 19 of its Order that "the proposed Islander East project will provide much needed security and reliability by providing a second facility to access supply in the event something happens to either of the pipeline facilities". The ELI System Alternative would rely on the existing Iroquois pipeline located in Long Island Sound and thus would only compound the dependency of natural gas consumers with the reliability of a single-line delivery system. This system configuration would make them vulnerable to any disruptions along to that system.

In summary, the ELI System Alternative is clearly not available, it is not practicable, nor is it capable of adequately fulfilling an elemental purpose of the Islander East Project; it cannot provide the operational and security of supply benefits of a separate natural gas pipeline crossing. With the issuance of the Order for the Islander East Pipeline Project, the FERC has determined pursuant to the NGA, that the project has been competently evaluated for reasonable alternatives and that there are no practicable alternatives that meet the purpose and need of the Islander East Pipeline Project.

***Extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses in the areas of consideration***

In preparation of its application to the FERC and through subsequent discussions with regulatory agencies, Islander East has evaluated the "extent and permanence of the beneficial and/or detrimental effects which the proposed activity is likely to have on the public and private uses in the areas of consideration". Islander East's evaluation included potential effects on Long Island Sound, threatened and endangered species and their habitats, cultural resources, and sensitive environmental features.

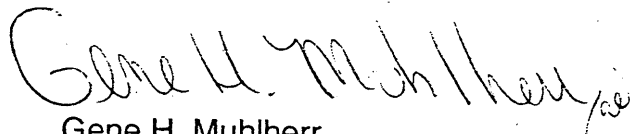
The FERC also evaluated the extent of both the permanent and temporary effects to the proposed project as it relates to both the private and public uses and prepared a Final EIS based on these evaluations in accordance with the

requirements of the NEPA. In the Final EIS, the FERC environmental staff concluded that, with the implementation of Islander East's proposed mitigation and adoption of the recommended mitigation measures provided in the Final EIS, the construction and operation of the Islander East Pipeline Project will have a limited adverse environmental impact.

On September 16, 2002, Brookhaven Energy Limited Partnership ("Brookhaven") filed comments on the Final EIS with the FERC. Brookhaven Energy has signed a precedent agreement with Islander East for firm transportation on the Islander East Project for deliveries to the site of its Brookhaven Energy facility. In its comments, included as attachment F, Brookhaven Energy noted that the New York State Board on Electrical Generation Siting and the Environment issued a Certificate of Environmental Compatibility and Public Need for the construction and operation of the Brookhaven Energy Facility on August 14, 2002. Brookhaven Energy also noted in its comments on the Draft EIS submitted on May 17, 2002, that the environmental benefits of Islander East should include reductions in harmful emissions of nitrogen oxides and sulfur dioxides on Long Island of 1,283 tons per year and 679 tons per year, respectively. Brookhaven Energy further states that the environmental benefits of the Islander East project far outweigh the minimal impacts of the construction of the new pipeline. More importantly, Brookhaven Energy stated "[N]one of the alternative proposals examined in the EIS proposal can provide Brookhaven Energy with the dependable source of natural gas supplies required for the viability of its project."

In conclusion and based on a review of these guidelines, it is reasonable to assert that there is no "practicable" alternative to the Islander East Pipeline Project and that Islander East is qualified to be a recipient of a federal permit from the Corps. Please call Joe Reinemann at (203) 488-1800 or e-mail at [jreinemann@duke-energy.com](mailto:jreinemann@duke-energy.com) if you have any questions.

Sincerely ,



Gene H. Muhlherr  
Senior Project Manager

#### Attachments

cc (w/ attachments): Mr. Joe Reinemann, Islander East Pipeline Company  
Mr. Tom Stanton, Islander East Pipeline Company  
Ms. Joanne Wachholder, Federal Energy Regulatory  
Commission

Attachments:

Attachment A:

Watson, Linwood A. Jr. (Federal Energy Regulatory Commission). Order on Rehearing and Certificates. Federal Order. September 19, 2002.

Attachment B

Daly, Kelly A. et al. (The Public Service Commission of the State of New York). Comments of the Public Service Commission of the State of New York on the Draft Environmental Impact Statement. Letter. May 17, 2002.

Attachment C

Myers, Edward B. et al. (The KeySpan Delivery Companies). Answer of the KeySpan Delivery Companies and KeySpan Utility Services, L.L.C in Opposition to Motion to Consolidate Proceedings and For Comparative Evidentiary Hearing. Letter. April 23, 2002.

Attachment D

Santa, Donald F. et al. (Iroquois Gas Transmission System, L.P.). Motion of Iroquois Gas Transmission System, L.P. Requesting Deferral of Consideration. Letter. October 4, 2002

Attachment E

Santa, Donald F. et al. (Iroquois Gas Transmission System, L.P.). Comments of Iroquois Gas Transmission, L.P. on Draft Environmental Impact Statement. May 20, 2002.

Attachment F

Pond, George M. (Brookhaven Energy Limited Partnership). Letter. September 16, 2002.

LD9246

Attachment A

**Order on Rehearing and Issuing Certificates for Docket  
Nos. CP01-384-000 et al. (Islander East Pipeline  
Project)**

Federal Energy Regulatory Commission

September 19, 2002

UNITED STATES OF AMERICA 100 FERC ¶ 61,276  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Islander East Pipeline Company, L.L.C. Docket Nos. CP01-384-000, -001  
CP01-385-000, -001  
CP01-386-000, -001

Algonquin Gas Transmission Company CP01-387-000, -001

ORDER ON REHEARING AND ISSUING CERTIFICATES

(Issued September 19, 2002)

1. On December 21, 2001, the Commission issued a Preliminary Determination (PD) in these proceedings addressing the nonenvironmental issues raised by Islander East Pipeline Company, L.L.C.'s (Islander East) and Algonquin Gas Transmission Company's (Algonquin) proposals to construct, own, operate, and lease capacity for a new interstate pipeline to transport gas in Connecticut and Long Island.<sup>1</sup> Final certificate authority was reserved pending completion of the environmental review then being conducted of the proposal.

2. Timely requests for rehearing of the December 21 order were filed by the Town of Branford, Connecticut (Branford), Algonquin, and the Southern Connecticut Gas Company and Connecticut Natural Gas Corporation (jointly, Connecticut Companies). The Connecticut Attorney General (Connecticut AG), the Central Pine Barrens Joint Planning and Policy Commission (Pine Barrens Commission), the Long Island Pine Barrens Society (Pine Barrens Society), and Jerry C. Shaw filed untimely requests for rehearing.<sup>2</sup>

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<sup>1</sup>Islander East Pipeline Co., L.L.C. (Islander East), 97 FERC ¶ 61,363 (2001).

<sup>2</sup>Section 19 of the Natural Gas Act (NGA) requires that a party file a request for rehearing within 30 days of the date of issuance of the order being contested. The statute does not grant the Commission authority to waive that requirement at its discretion. Therefore, we lack the authority to accept a late request for rehearing. However, we will address the concerns raised as requests for reconsideration.



3. We have now completed our environmental analysis of the proposal. In this order, we will consider and evaluate the environmental issues raised by Islander East's and Algonquin's applications and grant, in part, and deny, in part, the requests for rehearing and reconsideration. We find that our approval of this proposal will benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas for anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets.

4. Further, while we recognize that the Governor of Connecticut and the Connecticut Legislature have imposed moratoriums on utility crossings in Long Island Sound, as discussed below, we find it is in the public interest to issue Islander East's and Algonquin's requested certificate authorization at this time. The Commission has imposed numerous environmental conditions that require extensive consultation between the pipeline applicants and local agencies, including, among others, the Connecticut Department of Environmental Protection, before they can commence construction of the proposed facilities. The Commission believes it is imperative to issue this order at the time to allow Islander East and Algonquin to proceed with their proposed projects in a timely manner. Therefore, we will grant the requested certificate authorities, as modified and conditioned below.

#### **I. Background**

5. Islander East proposes to construct and operate a pipeline that will extend from an interconnection with Algonquin's existing C-System near North Haven, Connecticut, across Long Island Sound and terminate near Brookhaven, New York on Long Island. Islander East intends to provide transportation service to the KeySpan Gas East Corporation, d/b/a KeySpan Energy Delivery Long Island and The Brooklyn Union Gas Company, d/b/a KeySpan Energy Delivery New York (jointly KeySpan Delivery Companies). In addition, Islander East intends to provide transportation service to two power producers: (1) AES Endeavor, a division of AES Corporation (AES Calverton) and (2) Brookhaven Energy Limited Partnership, an affiliate of American National Power (ANP Brookhaven).

6. Islander East's proposed project will transport 260,000 Dth per day of natural gas on a firm basis to markets on Long Island, New York.<sup>3</sup> The facilities will consist of, among other things, approximately 44.8 miles of 24-inch pipeline. Approximately 22.6 miles of the pipeline will be located offshore in Long Island Sound. Approximately 10.2 miles of the pipeline will be located onshore in Connecticut and approximately 12 miles will be located onshore in Long Island.

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<sup>3</sup>Islander East's facilities are designed to transport the design capacity of 260,000 Dth per day and up to 285,000 Dth per day when factors change on Algonquin's C-System. See Islander East, 97 FERC at 62,698-99.

7. As part of the Islander East Project, Islander East intends to lease certain facilities from Algonquin's C-System. In Docket No. CP01-387-000, Algonquin proposes to construct a 10,310 horsepower compressor station near Cheshire, Connecticut at the beginning of its C-System, upgrade the current maximum allowable operating pressure (MAOP) of the C-System pipelines from 750 psig to 814 psig, repair two segments of pipe on the C-System, and relocate two pig launchers at the new Cheshire Compressor Station to increase the capacity on the C-System by the 260,000 Dth per day needed to provide the lease service for Islander East. The lease arrangement eliminates the need for Islander East to construct approximately 27 miles of new pipeline facilities.

8. In the December 21 order, the Commission found, based on consideration of all nonenvironmental issues, that issuance of certificates of public convenience and necessity to Islander East and Algonquin under the terms and conditions prescribed in the December 21 order would be in the public convenience and necessity if the environmental review were satisfactory. The Commission also found that Islander East's and Algonquin's proposed construction is consistent with the Policy Statement's criteria.<sup>4</sup>

## **II. Procedural Issues**

### **A. Late Interventions**

9. Meadowcrest Corporation (Meadowcrest) filed a motion to intervene on environmental grounds and a motion to intervene out-of-time. It states that Meadowcrest IV is a residential community and that the proposed route of the Islander East pipeline will go directly through this community in New York. Meadowcrest states that it did not become aware of the impact of the Islander East's proposed project until it received the draft environmental impact statement (EIS). Therefore, it contends that good cause exists to allow its motion to intervene out-of-time.

10. In response, Islander East states that it when it first planned its route in the Meadowcrest area, the relevant land parcel was owned by Mr. Bernard F. May. It states that Mr. May subsequently sold the property to the current owner, Mr. Strecker. Islander East states on

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<sup>4</sup>Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement), 88 FERC ¶ 61,227 (1999), orders clarifying statement of policy, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094 (2000).

May 25, 2001, it contacted Mr. Strecker, by phone and by letter, advising him that a pipeline would cross a portion of the property he planned to develop and to request permission to survey the parcel. Islander East states that Mr. Strecher denied its survey request made on May 25 and other subsequent requests.

11. When late intervention is sought after the issuance of a Commission order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.<sup>5</sup> While Mr. Strecker, the current developer of Meadowcrest IV, claims he was not aware that the proposed pipeline would impact the development until the draft EIS was issued, the correspondence with Islander East demonstrates that not only did it contact him concerning the project before the application was filed, it requested permission to survey the property "to make a more accurate determination of the impact . . . of the proposed pipeline on your property."<sup>6</sup>

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<sup>5</sup>See North Baja Pipeline L.L.C., 99 FERC ¶ 61,028 at 61,109-10 (2002).

<sup>6</sup>Attachment I to Islander East's July 23, 2002 reply to comments of Meadowcrest Corporation. The letter states that the surveying would require staking and flagging. Had Mr. Strecker allowed Islander East to survey the property prior to filing its application, he would have been fully aware of how the pipeline would have impacted his property before Islander East filed its application on June 15, 2001. In the May 25 letter, Islander East also requests a site plan map of the subdivision to include in its application. In its reply to Meadowcrest Corporation's comments, Islander East states that it did not receive any subdivision plans from Mr. Strecker until June 19, 2002 and that the plans it received did not disclose the proposed location of all the unbuilt residences.

12. In our view, Meadowcrest has not demonstrated good cause for failing to file a timely request for intervention. Therefore, we will deny Meadowcrest's motion to intervene out-of-time. However, under sections 157.10(a)(2) and 380.10(a)(1)(I) we will grant Meadowcrest's motion to intervene on environmental grounds.

**B. Answers to Rehearing Requests, Motion to Consolidate, and Subsequent Filings**

13. Islander East filed a reply and Algonquin filed an answer to the requests for rehearing and reconsideration. Iroquois Gas Transmission System, L.P. (Iroquois) filed an answer to Islander East's reply and the Connecticut Companies filed an answer to Algonquin's answer. The Pine Barrens Society filed a request for a joint review of the Islander East Project and Iroquois' Eastern Long Island (ELI) Project filed in Docket No. CP02-52-000.<sup>7</sup> Islander East filed a reply to Iroquois' answer and the Pine Barren Society's request for joint review. KeySpan Delivery Companies filed an answer to Iroquois' answer to Islander East's reply. The Connecticut AG filed an answer to Islander East's reply to Iroquois' answer and the Pine Barren Society's request for joint review.

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<sup>7</sup>On December 14 , 2002, Iroquois filed an application in Docket No. CP02-52-000 for authorization to construct its Eastern Long Island Expansion Project (ELI Project). The ELI Project, among other things, would provide approximately 175,000 Dth per day of firm transportation service to Eastern Long Island. Iroquois' proposed facilities would commence at an interconnect with Iroquois' existing mainline facility located in Long Island Sound. Downstream on Long Island, Iroquois' proposed pipeline would run parallel to Islander East's proposed pipeline.

14. The Connecticut AG, the Pine Barrens Society, and Iroquois filed individual motions to consolidate the Islander East proceeding with Iroquois' ELI Project. Islander East filed separate replies to the Connecticut AG in this proceeding and a response to Iroquois in Docket No. CP02-52-000. KeySpan Delivery Companies and Brookhaven Energy Limited Partnership (Brookhaven Energy) also filed responses to the motions to consolidate.<sup>8</sup>

15. Although the Commission's procedural rules prohibit answers to answers, we may, for good cause, waive this provision.<sup>9</sup> We find good cause to do so in this instance in order to insure a complete record in this proceeding. The parties filings are addressed below.

### III. Discussion

#### A. Motions to Consolidate and Requests for Joint Review

##### 1. Requests for Consolidation

16. As stated, the Pine Barrens Society, the Connecticut AG, and Iroquois filed motions to consolidate the Iroquois and Islander East proceedings. The Pine Barrens Society generally raises environmental concerns and requests that the Commission review the feasibility of Islander East and Iroquois operating a jointly-owned, single pipeline once their respective pipelines reach the mainland of Long Island.

17. The Connecticut AG states that both projects will reach landfall at the same point in Long Island, and, to all appearances, will serve the same markets. It contends that the two applications have common issues of fact, particularly with respect to environmental matters and issues of public need and convenience. Therefore, it concludes that the Commission should consolidate the two proceedings in order to determine whether either or both projects are needed and, if only one is needed, which project will best provide the necessary service to the public with the least adverse impacts.

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<sup>8</sup>The Preliminary Determination in the Iroquois proceeding in Docket No. CP02-52-000 is being issued concurrently with this order.

<sup>9</sup>18 CFR § 385.213(a)(2)(2002).

18. Iroquois states that a comparative evidentiary hearing is warranted because the applications involve common questions of fact and law and raise common issues regarding their environmental impact. It contends that the Commission should address these critical factual legal issues in a consolidated comparative hearing when it exercises its statutory responsibilities under the NGA and NEPA.

19. Iroquois and the Connecticut AG contend that under Ashbacker Radio Corp. v. FCC (Ashbacker),<sup>10</sup> where two bona fide, timely-filed applications are pending before an agency and the grant of one would either foreclose the grant of the other or place it under greater burden than it would have been under had it been considered at the same time as the first application, a comparative hearing on the merits of the two applications is required. Iroquois claims that authorizing the Islander East project would foreclose the development of the Iroquois ELI Project or, at the very least, place it under a greater burden. Therefore, it argues that consolidating the Islander East and Iroquois applications for a comparative hearing is consistent with the fundamental rationale underlying Ashbacker.

20. Iroquois contends that the three specific preconditions for applying Ashbacker are satisfied in this instance. First, it claims that its application is bona fide in that it has been filed with and is presently pending before the Commission. Second, it states that the application was timely filed. Iroquois states that when the Islander East application was filed on June 15, 2001, Iroquois advised the Commission, in its motion to intervene, that it intended to file an application for the ELI Project. Therefore, it believes that the Commission and all interested parties were on notice that it intended to file a competing application, which it states was filed in a timely fashion within six months of the Islander East filing.

21. Further, Iroquois contends that the two proposals are mutually exclusive because the grant of one would effectively preclude the grant of the other. Iroquois argues that both pipelines would serve the same market area, specifically the load growth in Eastern Long Island. Iroquois contends that either pipeline can be expanded to provide 500 MMcf per day of new pipeline capacity. It asserts that both pipelines ultimately tap into the same supply sources located off Sable Island, Canada. Further, Iroquois contends that even though the sponsors of the two pipeline projects have signed precedent agreements with different shippers, the projects effectively will serve the same end-use market, which will not grow at a rate fast enough to support both projects.

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<sup>10</sup> 326 U.S. 327, 329-31 (1945).

22. Iroquois states that the Ashbacker doctrine has been found not to apply where two projects serve two completely independent sets of customers.<sup>11</sup> However, it contends that the fact that the pipeline serves different customers should not be determinative of whether there is "economic" mutual exclusivity between the competing projects. Iroquois contends that notwithstanding the difference in the identity of the shippers, there is an overlap with respect to the end-use market which those shippers serve. Therefore, Iroquois concludes that the shippers that have executed precedent agreements reserving capacity on Islander East's and Iroquois' projects in fact represent different links in the supply chain that will serve the same end-use market on Eastern Long Island. As such, Iroquois reasons that the projects are mutually exclusive because should one project receive approval, the remaining project would be effectively precluded by the insufficient demand for an additional source of gas in the Eastern Long Island market.

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<sup>11</sup>Citing ANR Pipeline Co. (ANR), 78 FERC \_ 61,326 (1997), order issuing certificate and denying reh'g, 85 FERC ¶ 61,056 (1998), affirmed, ANR Pipeline Co. v. FERC, 205 F.3d 403 (D.C. Cir. 2000).

23. Iroquois argues that the fact that the two projects propose different commencement dates should be of no consequence for purposes of considering their competitiveness and mutual exclusivity. It contends that external circumstances have greatly reduced the likelihood that Islander East will maintain the schedule proposed by its sponsors. Iroquois points to: (1) delays in the electric generation coming on line on Long Island and the likelihood that gas service for those facilities will not be required until 2004 or 2005 and (2) attempts by Connecticut to limit the construction of utilities across Long Island Sound.<sup>12</sup>

24. Iroquois also states that NEPA requires that the Commission analyze reasonable alternatives and that the draft EIS issued in the Islander East proceeding recognizes that the ELI Project is a potential alternative to Islander East. It contends that the Iroquois alternative has a significant environmental advantage over Islander East in that it reduces the environmental impacts that are certain with the Islander East proposal, while still achieving the objectives of the proposed project.

25. Finally, Iroquois claims that the Commission has consolidated proceedings where there are similarities and overlap between pipeline proposals.<sup>13</sup> It argues that there are similarities that overlap between the two proposed projects, particularly with respect to environmental matters, and consolidation of common issues would foster administrative efficiency, avoid duplication of effort, and generally serve the public interest.

## 2. Parties Response

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<sup>12</sup>On April 12, 2002, the Governor of Connecticut issued Executive Order No. 26 that prohibits state agencies from approving any utility projects that cross Long Island Sound, among other things, until June 15, 2003. Similarly, on June 3, 2002, the Connecticut Legislature enacted Public Act No. 02-95, which imposed a one-year moratorium on utility crossings in Long Island Sound.

<sup>13</sup>Citing American Natural Rocky Mountain Co., 21 FERC \_ 61,229 (1982).



26. In response, Islander East states that its shippers chose service on its project because of their desire to ensure the reliability of their contracted transportation service.<sup>14</sup> Islander East asserts that because its facilities will establish a second transmission system across Long Island Sound, it is uniquely able to meet the needs of these shippers and the entire region for improved security and reliability. Moreover, it states that Islander East is able to meet those needs on a timely basis. It contends that its shippers, particularly KeySpan Delivery Companies, require service in the fall of 2003. Islander East claims that Iroquois' Motion to Consolidate represents a continued, unjustified, and inappropriate collateral attack on Islander East's PD by a competitor seeking to block the construction of new capacity into Connecticut and Long Island.

27. Islander East contends that Iroquois does not have a bona fide application. It states that the mere fact that it filed an application does not make it bona fide. Islander East states that Iroquois' motion undermines its ELI Project application by expressing a lack of confidence in the project and the market it serves. It contends that the claimed bona fides of Iroquois' proposal are betrayed by the fact that, unlike Islander East, Iroquois apparently does not have sufficient faith in its project to build a pipeline on the basis of its application as filed with the Commission.

28. Islander East also argues that Iroquois' ELI Project is not timely filed. It states that Iroquois filed its application six months after Islander East's application was filed. Islander East points out that the Commission has stated that:

[i]t seems clear to us that the filing of certificate applications and requests for comparative hearing must be reasonably simultaneous in time and indicate potential exclusivity on the face of the applications before an imperative application of the Ashbacker doctrine is called for.

Thus the alleged exclusivity involved here is one of potential saturation of a given market. But the timing of the applications for a certificate to serve any market is of the essence in determining whether due process requires a comparative hearing. It is scarcely reasonable that applicant B who files an application for a certificate 6 months later than applicant A should be able automatically to require a retroactive consolidation when A's proceeding is well along towards its conclusion.<sup>15</sup>

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<sup>14</sup>Islander East points out that at the Commission's Northeast Energy Infrastructure Conference held on January 31, 2002, reliability was a prevalent theme.

<sup>15</sup>Citing Transwestern Pipeline Co., 21 FPC 594 (1959), followed in Mohave Pipeline Co., 41 FERC ¶ 61,040 at 61,119 (1987).

Islander East asserts that it is not reasonable that two projects, filed six months apart, should be consolidated, particularly where those projects seek to serve entirely different shippers and thus, on their face are not mutually exclusive.

29. Islander East argues that the two projects do not propose to serve even a single common shipper. It further asserts that service under the two proposals is provided in different time frames. Islander East states that Iroquois argues that the Commission should ignore the fact that the two projects have precedent agreements with different sets of shippers because Iroquois proposes to serve marketers and gas suppliers who could, in turn, serve the end users and utilities who have contracted for service on Islander East, thereby enhancing competition.

30. Islander East asserts that Iroquois' argument is predicated on the complete collapse of the various market segments into a single segment, a notion which Islander East claims both defies reality and flies in the face of years of government effort to foster the development of multiple market sectors. Additionally, Islander East contends that preferring a pipeline that serves intermediaries rather than end users turns the competition argument on its head. Islander East states that such a preference would curtail market choices, foreclosing the ability of end users and utilities to purchase service directly rather than through middlemen. Islander East argues that Iroquois' reference to one generalized, geographic market on Eastern Long Island suggests again that Iroquois has no faith in the viability or firmness of its precedent agreements, and that Iroquois is contemplating the construction of a pipeline "on spec".

31. Islander East also contends that Iroquois' claim that there is only one generic Eastern Long Island market, and that the ELI Project is a superior alternative for serving that market, does not advance its consolidation request. Islander East asserts that the Commission has rejected such claims.<sup>16</sup>

32. Islander East contends that Iroquois fears that if Islander East is built, Iroquois' own shippers will have more of an incentive to walk away from the ELI Project. It states that the fact that Iroquois based its application on precedent agreements and economic arrangements which may not pan out is a risk Iroquois took, not a risk imposed on Iroquois by Islander East. Islander East asserts that the whole concept of the market determining viability of pipeline proposals would be turned on its head if, when a project sponsor lost confidence in the commitment of its shippers, it could invoke Ashbacher to impede the progress of another project which was prepared to proceeding with its proposal. Islander East states that the Commission should follow its longstanding policy of allowing projects to proceed on the strength of markets

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<sup>16</sup> Citing ANR, 78 FERC at 62,405-06.

presented in their applications, and letting the market determine whether one or both projects should be constructed.

33. Islander East also asserts that Iroquois' invocation of NEPA as a basis for consolidation is wrong. It points out that the draft EIS in the Islander East proceeding plainly fulfills the Commission's obligation under NEPA to analyze the environmental consequences of the proposed Islander East project, as well as alternatives to it. Islander East also asserts that Iroquois' premature claim that its ELI Project is environmentally superior is not justification for a consolidation as such a determination has not been made. Further, Islander East claims that even if the Commission were to determine that the ELI Project offers some environmental advantage, that advantage would not be dispositive. Beyond its contention that any such advantage is likely to be negligible, Islander East states that the Commission is not constrained by NEPA from deciding that other values outweigh the environmental costs<sup>17</sup> and that it has approved projects for countervailing policy reasons.<sup>18</sup> Islander East states that there would be every reason for the Commission to do so here, where the claimed Iroquois ELI Project advantage is outweighed by the security and reliability benefits of Islander East's creation of a second gas transmission line across Long Island Sound.

34. Finally, Islander East states that contrary to Iroquois' claim, consolidation of the projects would result in administrative havoc, not administrative efficiency. It states that the Commission has stated that a comparative hearing is inherently a time consuming resolution process which frustrates the objective of timely development of reliable transportation infrastructure.<sup>19</sup> Islander East states that the Commission has issued both the PD and the draft EIS for Islander East while Iroquois has secured neither of these. Islander East contends that interrupting the Islander East proceeding and complicating it by consolidating the ELI Project, would not only be administratively inefficient, but would be patently unfair to Islander East.

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<sup>17</sup>Citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) and *Southern Natural Gas Co.*, 76 FERC ¶ 61,122 at 61,646 (1996).

<sup>18</sup>Citing *Southern Natural Gas Co.*, 79 FERC ¶ 61,280 at 62,205 (1997).

<sup>19</sup>Citing *ANR*, 78 FERC ¶ 62,405.

Moreover, it argues that the regulatory uncertainty so created would be unfair to numerous parties, including Islander East's shippers, developers and their financial backers, and the end-users.

35. In response, to Iroquois' motion to consolidate, KeySpan Delivery Companies state that they have entered into precedent agreements with Islander East for firm transportation service up to a maximum daily quantity that increases from 110,000 dth in the first year to 295,000 Dth in the fifth year of operation. They state that the precedent agreements contemplate that service on the pipeline will commence on or about November 1, 2003. KeySpan Delivery Companies state that they require the additional gas supplies to be provided by Islander East to ensure that they have sufficient natural gas supplies to reliably serve the needs of their firm customers during the winter of 2003-2004.

36. KeySpan Delivery Companies state that they have public service obligations to provide safe and adequate gas distribution services to consumers in the Boroughs of Brooklyn, Queens, and Staten Island in New York City and on Long Island. KeySpan Delivery Companies state that they currently serve approximately 1.8 million customers, most of whom are residential and small commercial customers who use natural gas for life sustaining uses such as heating and cooking.

37. KeySpan Delivery Companies state that they are not only customers of Islander East, they are also Iroquois' largest firm transportation customers. They assert that Iroquois is currently the only transmission pipeline that serves Suffolk County, Long Island. Such service is through a single delivery point. KeySpan Delivery Companies contend that disruption of existing firm service from Iroquois for any significant period could require KeySpan Delivery Companies to curtail service to up to approximately 124,000 customers on Eastern Long Island. They state that such curtailments would have a significant and possibly disastrous impact. KeySpan Delivery Companies state that with the addition of Islander East, they believe that a loss of service from either Islander East or Iroquois would not require that they curtail service to any firm customer. Therefore, they conclude that the construction of Islander East significantly enhances the reliability of KeySpan Delivery Companies' distribution services.

38. KeySpan Delivery Companies assert that its reliability concerns extend not only to gas distribution but also to the cost and reliability of electric supply. They state that Iroquois is the single interstate natural gas pipeline currently delivering gas for use in its generating plants in Suffolk County. They contend that reliability rules issued by the New York Reliability Council require planning for the single failure of any gas pipeline. KeySpan Delivery Companies state that the expansion of Iroquois to the exclusion of Islander East would significantly complicate and potentially compromise their ability to comply with the reliability standards. Further, KeySpan Delivery Companies state that its Delivery Companies require additional gas supplies that will be provided by the Islander East Project to ensure sufficient supplies to serve the needs of their customers during the winter of 2003-2004.

39. Brookhaven Energy raises arguments similar to those raised by Islander East and KeySpan Delivery Companies. Brookhaven Energy also argues that the Commission's current policy place both Iroquois and Islander East at risk with respect to their expansion projects and allow competition and consumer choice, rather than the Commission's administrative process, to decide whether either or both of the proposed projects will succeed. Therefore, it requests that the Commission "decline Iroquois' invitation to overturn its current policies on the certification of new pipeline projects and to substitute its judgment for the judgement of market forces in determining how increasing demands for natural gas service on Long Island will be met."<sup>20</sup>

40. The New York Public Service Commission (PSC) asserts that while Islander East and Iroquois' ELI Project are slated to serve a distinct set of customers, it may be possible to meet all of eastern Long Island's requirements with a single project. However, the New York PSC contends that if only one pipeline is built, the competitive market and downstream system situation should weigh heavily in the process of deciding which project should be certificated. The New York PSC states that while Iroquois' ELI Project is shorter and could pose fewer environmental impacts, it uses a portion of the existing Long Island crossing. New York PSC asserts that a totally separate Sound crossing, as proposed by Islander East, provides contingency protection for both gas and electric systems against a total loss of supply if damage were to occur to the Iroquois line upstream of the interconnection to the ELI facilities. The New York PSC states that given the current information, if one line were to be built, its preference would be that Islander East be certificated because it will provide another source of delivery to Long Island.

### 3. Commission Response

41. In ANR, the Commission addressed the applicability of Ashbacker in a post-Order No. 636 environment. In that case, ANR and Nautilus Pipeline Company (Nautilus) proposed to construct similar facilities that essentially ran parallel to each other in the Outer Continental Shelf. While ANR had filed its application at approximately the same time as Nautilus, the processing of ANR's application was delayed because it did not submit the information necessary for the Commission to assess its project's environmental impacts. Subsequently, ANR requested that the Commission consolidate its application with the Nautilus application because if Nautilus was built, "it would likely foreclose ANR's project or place it under a greater burden."<sup>21</sup>

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<sup>20</sup> Brookhaven Energy's answer to motion to consolidate at 3.

<sup>21</sup> ANR, 78 FERC at 62,398.

42. The Commission determined that ANR's position amounted to a claim that in all circumstances Ashbacker requires the Commission to intervene in order to resolve a business competition between parties, if there is a possibility that the loser of the competition would ultimately decide the better part of discretion is to withdraw from the field. The Commission found that this is too rigid a view, of Ashbacker that would result in an application of that rule in a manner that would undermine the public interest considerations of the NGA. The same reasoning applies to Iroquois' position here.

43. In ANR, the Commission explained that Ashbacker was decided when the prevailing approach to regulation, not just at the Commission but before other regulatory bodies, was far different than it is today. Under that approach, federal agencies were called upon to apply their judgment and expertise to protect the public from large corporations wielding significant market power. At that time, the winner of a battle for the right to use a particular radio frequency, airline route, or pipeline route would be guaranteed a virtual monopoly in that market because the proposals were truly mutually exclusive. In some instances, such as where there was only one radio frequency that remained to be assigned, the mutual exclusivity resulted from the "physical" impossibility of approving more than one application. In other instances, however, the mutual exclusivity arose because the prevailing regulatory approach was for agencies to address public interest considerations by examining the specific economic justification for a proposal. When an agency was confronted with competing proposals, the agency needed to determine which one, in its judgment based on the record, would best serve the public interest and then approve only that project to operate under close regulatory scrutiny of its rates and services.

44. Thus, the traditional regulatory model required careful comparison of competing proposals, because only one could be granted. The monopolistic advantages conferred on the winner would effectively bar others from entering that market and, absent close oversight of the winner's rates and services, would leave consumers subject to exploitation. In the pipeline industry, as well as in other industries that have undergone partial or complete deregulation, that is no longer the case. In ANR, the Commission determined that a rigid application of Ashbacker principles, without regard to changed circumstances in industries undergoing deregulation, is likely to have harmful results for the public and serve no valid purpose in protecting a competitor's right to a hearing on its proposal.<sup>22</sup>

45. Iroquois contends that if Islander East were to be constructed, there is not a sufficient market in the near future to support both projects, foreclosing its opportunity to

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<sup>22</sup> See ANR, 85 FERC at 61,175.

construct its ELI Project. However, as discussed below, the Commission finds that the two proposed projects will serve different shippers and that there is sufficient forecasted long-term market growth to support the Commission's approval of both proposed projects. Therefore, for purposes of the Ashbacker doctrine, the two projects are not mutually exclusive and our approval of Islander East will not necessarily foreclose Iroquois from constructing the ELI Project.

46. Under the NGA, the Commission is charged with furthering the public interest in authorizing the construction and operation of interstate natural gas pipelines. This entails consideration of many interests and goals. As Congress, the Commission, and the courts have interpreted it over the decades, this mission includes, among other things, the assurance of adequate supplies of natural gas to consumers, and the assurance of adequate competition among suppliers to cut costs and improve market conditions for the benefits of consumers.

47. In the Islander East proceeding, Islander East is proposing to construct facilities to provide up to 285,000 Dth per day of service to New York City and Long Island. Islander East's precedent agreements with its shippers include provisions under which they could increase their levels of service up to 445,000 Dth per day by 2008.<sup>23</sup> A marketing study provided by Islander East in its application estimates that peak demand for natural gas for KeySpan Delivery Companies alone will grow to 468,000 Dth per day by 2010.<sup>24</sup>

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<sup>23</sup>Islander East would, of course, have to apply for and receive, certificate authority to construct the facilities as necessary to provide those additional increments of service.

<sup>24</sup>This projection does do not include the volumes that Islander East would transport directly to its other shippers in this project, AES Calverton and ANP Brookhaven. Service to these shippers under the current proposal totals an additional 150,000 Dth per day.

48. Six months after Islander East filed its application, Iroquois filed an application in which it proposed to construct facilities to provide 175,000 Dth per day of capacity to Eastern Long Island. Although Iroquois only proposed to construct facilities to provide for 175,000 Dth per day of firm capacity, it asserted that it had precedent agreements for 340,000 Dth per day of capacity.<sup>25</sup> However, approximately two months after filing its application touting a demand for approximately twice the capacity it proposed to construct, Iroquois filed a pleading in this proceeding claiming that there is not enough demand to support both pipelines and further, if Islander East builds its pipeline, there will be no customers for the 175,000 Dth per day of capacity being proposed by Iroquois.<sup>26</sup> To support its argument in this proceeding, Iroquois, too, included a marketing study. Iroquois' study estimates that the New York/Long Island market is estimated to increase to only approximately 475,000 Dth per day by the year 2010.

49. As discussed above, the precedent agreements filed by Islander East and Iroquois in their respective proceedings demonstrate a potential market for 785,000 Dth per day of capacity by 2008 (340,000 Dth per day by 2004 for Iroquois and 445,000 Dth per day by 2008 for Islander East). The market studies filed in support of the applications project market demands of at least 475,000 Dth per day (Iroquois) or 618,000 Dth per day (Islander East) by 2010. Thus, regardless of which measure of future market demand the Commission relies on, the evidence in the record clearly supports a finding by the Commission that the long-term New York/Long Island market can support the 460,000 Dth per day (285,000 Dth per day for Islander East and 175,000 Dth per day for Iroquois) being proposed by both Islander East and Iroquois in their pending applications.

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<sup>25</sup>Iroquois stated that it would make any decisions concerning the need to pro-rate capacity among its shippers no later than March 1, 2003.

<sup>26</sup>Iroquois first raised its belief that there would not be sufficient demand to construct the ELI Project in its February 19, 2002 answer to Islander East's February 6, 2002 reply to the requests for rehearing. Iroquois subsequently repeated its contention in its Motion to Consolidate filed on April 8, 2002.



50. Commission policy dictates allowing the market to determine which projects are best suited to serve the infrastructure needs of an area. The Commission believes this approach best serves the public interest and allows for the most efficient, cost effective, and timely development of pipeline infrastructure. A market-oriented approach not only allows attainment of the Commission's objectives in the short term, but it is consistent with the long-term market-oriented policy goals the Commission has followed for over 15 years. Approval of a variety of projects benefits the public by allowing it to choose which of the available proposals offers the most attractive and timely service.

51. By approving both proposals, the Commission gives both pipelines the opportunity to compete on a level playing field, which is the essence of Ashbacker.<sup>27</sup> Allowing market forces to determine the success or failure of the projects is the most efficient mechanism to assure the maximum use of facilities. The fact that the two projects follow similar routes and terminate at points proximate to each other does not require a finding that the two projects are mutually exclusive. The Commission has determined that allegedly competitive proposals do not rise to the level of mutual exclusivity if the proposals differ in terms of facilities proposed, incremental capacity, capital costs, customer beneficiaries, or intended benefits.<sup>28</sup>

52. Iroquois argues that the fact that the pipelines will serve different customers should not be determinative of whether there is "economic" mutual exclusivity between them. It claims that notwithstanding the difference between the identity of the shippers, there is an overlap with respect to the end-use market which such shippers serve.

53. Islander East's shippers consist of two proposed electric generation plants and the KeySpan Delivery Companies, -- gas distribution, electric generation, and electric transmission companies. Iroquois' shippers consist of a state-owned power provider, an electric retailer, and three gas marketers. In essence, Iroquois is requesting that the Commission conduct an Ashbacker hearing to determine if Islander East's end-user shippers would be better served by Iroquois' marketer shippers. Such a request is contrary to the Commission's longstanding policy of allowing customers to choose their own service providers.

54. We also note that Iroquois' precedent agreements with gas marketers account for approximately 41 percent, or 140,000 Dth per day, of the 340,000 Dth per day of capacity that it claims it has subscribed under its precedent agreements. Even if its marketer shippers fail to sign final contracts for the ELI Project, Iroquois still has 200,000 Dth per day of capacity subscribed under precedent agreements for its proposed design capacity of 175,000 Dth per day with

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<sup>27</sup>Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309 at 1320 (D.C. Cir. 1995).

<sup>28</sup>ANR, at 62,405, citing Northern Natural Gas Co., 51 FERC ¶ 61,316 at 62,052-53 (1990)

potential end users who differ from those who subscribed to Islander East's project. While Iroquois may argue that its prospective electric generation shippers may not proceed with their proposed gas-fired electric generation facilities if Islander East's electric generation shippers proceed with theirs, it is beyond the role of the Commission in these proceedings to interfere with the business decisions of such customers.

55. For the reasons discussed above, Iroquois' claim, made in numerous filings in this proceeding, that it will be foreclosed from constructing its ELI Project if Islander East is constructed is without factual predicate. As stated, in its application for its ELI Project, Iroquois filed precedent agreements for twice the amount of capacity it proposed to construct in that proceeding. While Iroquois' precedent agreements, among other things, give almost all of its shippers an unrestricted right to terminate those contracts for any reason prior to April 2002,<sup>29</sup> Iroquois has not filed any updated evidence in its ELI Project proceeding indicating that any of its prospective shippers may have terminated their contracts.

56. Further, the Commission has determined that allegedly competitive proposals do not rise to the level of mutual exclusivity if the proposals differ in terms of intended benefits. The proposed Islander East Project provides two significant benefits that Iroquois' ELI Project does not. First, Iroquois is currently the only pipeline that provides direct access to Long Island. The proposed Islander East Project will provide Long Island with another source of supply, allowing this market to enjoy the benefits of pipeline-to-pipeline competition for the first time. More importantly, the proposed Islander East project will provide much needed security and reliability by providing a second facility to access supply in the event something happens to either of the pipeline facilities. Iroquois' proposed ELI Project cannot provide similar benefits. Therefore, the proposed projects are not mutually exclusive and do not require that the Commission conduct an Ashbacker hearing.

57. Iroquois argues that the fact that the two projects propose different commencement dates should be no consequence for purposes of considering their competitiveness and mutual exclusivity. Other parties raise similar arguments. They contend that because of the potential delays in the construction of the proposed generation facilities and delay created by the Connecticut moratorium, Islander East will not be constructed in time to meet its 2003 in-service date. Therefore, they contend that the Commission should consider the two projects together.

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<sup>29</sup>The precedent agreement with Long Island Lighting gives it the right to terminate its contract for any reason until June 2005.

58. KeySpan Delivery Companies has stated that they need the capacity on Islander East to ensure sufficient supplies to serve the needs of its customers during the winter of 2003-2004. Having found that these projects are not mutually exclusive we see no reason to delay processing Islander East's proposed project for purposes of comparative consideration. Issues concerning the Connecticut moratorium are addressed below.

59. Iroquois and other parties contend that NEPA requires that the Commission analyze reasonable alternatives and that the draft EIS in the Islander East proceeding recognizes that the ELI Project is a potential alternative to Islander East. It contends that the Iroquois alternative has a significant environmental advantage over Islander East in that it reduces the environmental impacts that are certain with the Islander East proposal, while still achieving the objectives of the proposed project.

60. NEPA's requirement that alternatives be analyzed, by itself, does not trigger a comparative hearing. We have fully reviewed Islander East's project and are in the process of reviewing Iroquois' project in compliance with the requirements of NEPA.<sup>30</sup> In this proceeding, the Commission took into account Iroquois' pending proposal and recognized that its existence may affect the balancing required in deciding whether there was sufficient need for both projects. In performing this balancing, the Commission is mindful that the environmental conditions can only minimize, never entirely eliminate, a project's impact. As stated, we have concluded that with appropriate environmental conditions, Islander East's proposed project can be made environmentally acceptable and that the public interest requires that the Commission approve Islander East's proposal and issue it a certificate to construct and operate its proposed facilities.

61. Finally, Iroquois claims that the Commission has consolidated proceedings where there are similarities and overlap between pipeline proposals.<sup>31</sup> It argues that there are similarities that overlap between the two proposed projects, particularly with respect to environmental matters, and consolidation of common issues would foster administrative efficiency, avoid duplication of effort, and generally serve the public interest. We disagree. A comparative hearing is inherently a time consuming resolution process. Timely development of

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<sup>30</sup>See ELI Extension Project Draft EIS, issued in Docket No. CP02-52-000 on August 23, 2002.

<sup>31</sup>Citing American Natural Rocky Mountain Co., 21 FERC \_ 61,229 (1982).

the necessary pipeline infrastructure and the parties stated need for the facilities for the 2003/2004 heating season are our chief considerations. We believe our approach best serves those purposes, as well as administrative efficiency.

**B. Connecticut Moratorium/Federal Preemption**

62. On April 12, 2002 the Governor of Connecticut issued Executive Order No. 26 that prohibits state agencies from approving any utility projects that cross Long Island Sound, among other things, until January 15, 2003. Similarly, on June 3, 2002, the Connecticut Legislature enacted Public Act No. 02-95 which imposed a one-year moratorium on utility crossings in Long Island Sound. Both actions created a task force to assess the environmental impact of such crossings and to determine the present and future energy needs of Connecticut. Many Connecticut local and federal officials, representatives, agencies, and individuals filed requests with the Commission urging that it honor the Connecticut moratorium.

63. In enacting the NGA, Congress placed ultimate authority for determining the location of interstate pipelines with the Commission, "a federal body that can make choices in the interest of energy consumers nationally."<sup>32</sup> While the Commission respects Connecticut's decision to undertake an assessment of its future energy needs and to take seriously its environmental responsibilities regarding Long Island Sound, the Commission is charged with a broader mandate to promote a secure, high quality, and environmentally responsible interstate natural gas pipeline infrastructure to meet the energy needs of the nation as a whole. As discussed above, the initial customers of this project are in Long Island and New York, and they have indicated a need for the proposed service in a time frame that could not be accommodated were the Commission to defer its consideration of the applications before it for the pendency of Connecticut's moratorium.<sup>33</sup>

64. If the Commission does not issue this certificate now, it will abdicate its responsibility to expedite necessary pipeline infrastructure to supply the future market needs of Long Island consumers. While, as several commentators contend, circumstances may develop such that Islander East cannot commence the service proposed on the currently projected timetable, it is not in the public interest to make that possibility a certainty by failing to move forward in this proceeding in a timely manner.

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<sup>32</sup>See National Fuel Gas Supply Corp. v. Public Service Comm. of NY, 894 F.2d 571 at 579 (2nd Cir. 1990)

<sup>33</sup>We note that the Commission also received letters from New York officials and representatives urging that the Commission continue to process the Islander East application.

65. We also note that the NGA and the regulations promulgated by the Commission under that statute generally preempt state and local law. However, the Commission encourages applicants to cooperate with state and local agencies. As demonstrated by the Environmental Conditions determined in the Final EIS and listed in the Appendix to the order, the Commission requires extensive consultation between the pipeline applicant and local agencies, including the Connecticut Department of Environmental Protection and the New York State Department of Environmental Conservation, among others. The state of Connecticut still has a significant role to play prior to the ultimate completion of this project.

**C. Rehearing and Clarification Issues**

**1. Public Convenience and Necessity/Policy Statement**

**a. Subsidization**

66. On rehearing, the Connecticut Companies argue that the incremental pricing under the Islander East lease with Algonquin is subsidized by Algonquin's existing customers in violation of the Commission's Policy Statement. They contend that Algonquin's C-System is an asset paid for by Algonquin's existing customers. They argue that because the incremental lease payment does not include any payment for the existing C-System facilities, Islander East is not contributing to the costs of the facilities already in place that make the expansion possible. Therefore, the Connecticut Companies conclude that the expansion project is being subsidized by Algonquin's existing customers.

67. The Connecticut Companies argue that under the Policy Statement, incremental rate treatment does not necessarily avoid subsidies where, as here, the incremental rate is lower than the existing rolled-in rates and the expansion is premised on existing facilities that provide the platform for relatively inexpensive expansion. The Connecticut Companies assert that in deciding that no subsidy exists here, the Commission ignores this fundamental tenet of the Policy Statement and simply assumes that because the construction is "strictly incremental," the pricing should be as well.

68. In response, Algonquin states that the Connecticut Companies' attempt to compare the lease payment and Algonquin's existing system average rate is inappropriate. Algonquin states that under Commission precedent, the Commission evaluates the appropriateness of leases by comparing these payments with the lessor's firm transportation rates for comparable service.<sup>34</sup> Algonquin also contends that the Connecticut Companies' argument that Islander East should be making contributions to the cost of the pre-existing facilities is inconsistent with numerous Commission orders in which the Commission has determined that the incremental rate should be

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<sup>34</sup> Citing Columbia Gas Transmission Corp., 78 FERC 61,030 at 61,113 (1997).

based solely on the cost of the incremental facilities, without any contribution to pre-existing facilities.

69. Generally, the Commission views lease arrangements differently than transportation services under rate contracts. Accordingly, the Connecticut Companies' comparison of Algonquin's existing rate to the rate charged under the lease agreement for subsidy purposes is misplaced. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.<sup>35</sup> To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7 certificate authorization to acquire the capacity. Once acquired, in essence, the lessee owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity. Most frequently, leases are used in conjunction with new pipeline facilities to avoid the need to construct additional facilities in new rights-of-way. The Commission encourages pipelines to design their systems using leases to lessen the need to use eminent domain. The Commission's policy is to approve a lease if it finds that: (1) there are benefits for using a lease arrangement; (2) the rate under the lease is less than comparable transportation service; and (3) the lease arrangement does not adversely affect existing customers.<sup>36</sup>

70. In the December 21 order, the Commission determined that the Islander East lease will result in a lower rate than if Islander East constructed the required facilities. Additionally, as Algonquin points out, the lease payment is less than comparable transportation service. Further, the lease arrangement eliminates the need for Islander East to construct 27 miles of new pipeline, thereby avoiding disruption to the environment. Under the proposed lease agreement, Algonquin's existing customers will continue to pay the same rate and receive the same service that the Commission has determined to be just and reasonable. They will not incur any additional expense because of the lease arrangement. Further, the proposed lease arrangement

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<sup>35</sup>Texas Eastern Gas Transmission Corp., 94 FERC ¶ 61,139 at 61,530 (2001).

<sup>36</sup>See Columbia Gas Transmission Corporation, 79 FERC ¶ 61,160, at 61,755-59 (1997); Midwestern Gas Transmission Co., 73 FERC ¶ 61,320, at 61,888 (1995); and Mobile Bay Pipeline Projects, 55 FERC ¶ 61,358, at 62,078 (1991).

provides significant benefits by promoting the efficient use of facilities without imposing additional costs, including needless monetary expense and environmental expense of constructing duplicate facilities. Therefore, consistent with Commission policy concerning leases, we reaffirm our finding that the lease is in the public convenience and necessity.

**b. Other Policy Statement Issues**

71. The Connecticut Companies contend that the Commission's benefits and impacts analysis is lacking. They argue that the Commission has found, without explanation, that the Algonquin/Islander East project is desirable because it is well positioned to provide fully integrated access between New York and New England. They contend that there is no basis for this conclusion. They state that Islander East's Long Island-based facilities will not interconnect with other pipelines, and that backhaul opportunities from Long Island north through the Islander East system are non-existent. Further, the Connecticut Companies state that there is no reason to believe that they will have any use for the capacity created on Algonquin's C-System.

72. The Connecticut AG contends that the Commission should reconsider its decision in the PD because there has not been a determination of need for both projects. It also states that Connecticut's pipeline infrastructure is already "tight." It claims that if the Islander East project and Iroquois' ELI Project use capacity on the existing pipelines in Connecticut for their proposed projects, it would have strategic implications for the security of New England's power supply. The Connecticut AG also asserts that the Islander East project will not result in any appreciable new natural gas infrastructure capacity. He asserts that the project will require Connecticut customers to subsidize a tap from the existing, barely adequate gas supply solely to benefit the corporate owners of the project.

73. Many individuals commenters, including Branford in its rehearing request, raise concerns that since the pipeline will not benefit Connecticut consumers, the benefits of the proposed pipeline project cannot outweigh its adverse impacts. Branford and others also argue that the Commission failed to consider the Iroquois' ELI Project. They argue that Iroquois' project appears to serve the same market and may be preferable to Islander East's project. They argue that the Iroquois project appears to have less impact on landowners and the environment. Therefore, they contend that if a superior competing project renders the Islander East project unnecessary, the adverse economic impacts on landowners outweigh any benefits.

74. Under the NGA, the Commission is required to make decisions concerning the public interests of energy consumers on a national basis. The proposed Islander East and Algonquin Projects increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects. Further, it will introduce pipeline-to-pipeline competition to Long Island markets. The fact that Algonquin's existing customers and Connecticut residents may not appear to benefit from the proposed projects does not mean that the proposed project's benefits do not outweigh any potential adverse impacts. The Islander East and Algonquin projects will be

able to increase the capacity that is available on those pipelines in Connecticut that could potentially serve Connecticut customers when and if potential shippers in Connecticut decide that they need to contract for more capacity. Also, interruptible service could be established at the currently proposed capacity level through the addition of taps in Connecticut.

75. Branford and numerous commentors contend that the Commission failed to weigh the significant harm the proposed projects will have on landowners. Branford contends that the Commission failed to evaluate the significant economic harm to landowners. It cites to the Branford Blue Ribbon Committee report that estimates the proposed Islander East project could result in present value losses of over \$861 million in disruption of the town's shellfish beds. It also estimates a \$500,000 impact on the town's tourism industry. It also contends that the Commission failed to consider other findings in the report.

76. Generally, the Commission believes that pipelines designed to be placed in existing utility and transportation rights-of-way have less adverse impacts than new greenfield pipelines that require new rights-of-way. Because approximately 83 percent of the Islander East pipeline, as determined in the final EIS, will be constructed in, or adjacent to, of existing pipeline, powerline, railroad, and road rights-of-way, it will have less of an impact than it would if it were an entirely new greenfield pipeline. Further, Islander East's lease agreement with Algonquin eliminates its need to construct 27 miles of its own pipeline facilities. In response to landowner concerns during the EIS process, Islander East proposed, and the Commission has approved, numerous variations in its proposed route in response to landowner concerns. Also, as discussed below, Islander East has negotiated crossing/settlement agreements with all the leaseholders of the shellfish leases directly impacted by the construction of its pipeline in Long Island Sound.

77. As stated, Branford contends that the Commission did not address the findings of its Blue Ribbon Report. First, we note that Branford's Blue Ribbon Report contained mostly environmental issues that are discussed in the final EIS. In its rehearing request, Branford states that the Commission ignored the findings that irreversible damage to the leased shellfish beds could amount to \$8.7 million annually. We find Branford's anticipated damages are overstated. First, it assumes that all the leases will be permanently and totally damaged. As discussed below and in the final EIS, the Commission believes that the proposed mitigation measures would minimize the potential adverse impacts. Additionally, we note that Islander East is responsible for potential damages that are a direct result of the construction of its pipeline.

78. We also believe that Branford's estimated impact of \$500,000 on the town's tourist industry is also overstated. Branford believes that the proposed Islander East Project threatens and will totally reduce the attraction of the Stony Creek area. Generally, the impact of the construction of any specific area should last for less than a month.<sup>37</sup> When crossing a road, Islander East will bore under the road so as not to disrupt traffic within the town. Further, once

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<sup>37</sup>Final EIA at 3-167.



constructed, there will be no residual construction or visual impacts that would impact the town's tourism.

79. On rehearing, Branford also claims that the Commission did not quantify the costs and benefits. Therefore, it states that there could be no economic balancing test and no reasoned conclusion that the project is in the public interest. The Commission's public interest balancing of impact and benefits is not a quantitative analysis. Generally, the Commission's statutory obligation to weigh and balance factors for its public interest consideration cannot be done with the mathematical precision that Branford demands. Nevertheless, the Commission has identified the benefits and burdens of the project as they affect the public interest and explained the reasons underlying its decision.

80. Therefore, under the Policy Statement, the Commission finds that Islander East has sufficiently minimized the impact the proposed project will have on landowners. As discussed below, based on the findings in the final EIS, we believe that the adverse environmental impacts created by the project can be adequately mitigated so that the benefits of increased flexibility and reliability of the interstate pipeline grid and the introduction of pipeline-to-pipeline competition to Long Island markets will outweigh the adverse impacts.

## 2. Algonquin Operating Pressure

81. In the December 21 order, the Commission determined that the delivery pressures at Algonquin's Guilford and North Haven delivery points for the Connecticut Companies will decrease to 331 psig and 387 psig, respectively. On rehearing, the Connecticut Companies state that historically pressures at the North Haven delivery point have been in the range of 400 psig. They contend that Algonquin originally informed the Connecticut Companies that the pressures at the North Haven delivery point would increase to 665 psig as a result of the construction of the proposed facilities. However, Algonquin's actual filing reflects a pressure at the North Haven Gate Station of 387 psig. On rehearing, the Connecticut Companies request that the Commission: (1) clarify on the record how Algonquin's original prediction of the North Haven Gate Station pressure of 665 psig declined by more than 70 percent to 387 psig in the filed application;<sup>38</sup> and (2) how Algonquin's estimate of 387 psig is credible.

82. In its review of Algonquin's proposed project, the Commission analyzed the pressures on Algonquin's systems that would result from the construction of the proposed

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<sup>38</sup>We note that in its amended rehearing request, the Connecticut Companies added a footnote that states that Algonquin representatives met with Southern Connecticut after the application was filed and explained that originally predicted pressure level at the North Gate Station dropped because of changes in assumptions it made about the project.

facilities. This analysis determined that once the facilities are constructed, the delivery pressure at the North Haven delivery point would be 387 psig. As noted in the December 21 order, Algonquin's contractual obligation for the North Haven delivery point is 199 psig. Therefore, the reduced pressure is still substantially above Algonquin's contractual obligation and provides an acceptable level of pressure for the Connecticut Companies. The Connecticut Companies have not presented any new evidence that would warrant a change in the Commission's finding in the December 21 order. The question of why Algonquin's pre-application prediction of the resulting pressures was different from the pressure represented in its filed application is irrelevant.

83. In his filed comments, Paul Haung also contends that the changes in pressures that will result from the construction of the Algonquin and Islander East projects will decrease the amount of gas that is available to Connecticut consumers. We disagree. As stated in the December 21 order, the Commission has reviewed the design capacity of Algonquin's project and has concluded that the facilities are properly designed to provide the 260,000 Dth per day of additional firm capacity required under the Lease Agreement. Because the proposed facilities are designed to provide the increased capacity required, Algonquin's existing capacity and its current service to its existing customers will not be impacted.

### 3. Algonquin's Rehearing Request

#### a. Depreciation Rate

84. In the December 21 order, the Commission required that Algonquin fully amortize the cost of the incremental facilities to provide the service for Islander East under the lease to the 20-year term of the lease to ensure that Algonquin's existing customers are protected from any adverse rate impact at the conclusion of the Lease Agreement. On rehearing, Algonquin states that in approving previous expansion of the Algonquin system the Commission has approved the application of the systemwide depreciation rate for incremental facilities.<sup>39</sup>

85. Algonquin states that there is nothing in the record in this proceeding to support a conclusion that the incremental facilities that are being created to supply the proposed capacity under the Islander East lease will not be used beyond the term of the lease. It states that the capacity is mainline-type flow rather than a single proposed lateral. Algonquin contends that it has every expectation that additional customers and additional load will be added to the Long Island and Connecticut markets sufficient to support the lease capacity past the 20-year term.

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<sup>39</sup>Citing *Maritimes & Northeast Pipeline, L.L.C. and Algonquin Gas Transmission Co.*, 95 FERC ¶ 61,077 (2001); *Algonquin Gas Transmission Co.*, 97 FERC ¶ 62,152 (2001); *Algonquin Gas Transmission Co.*, 84 FERC ¶ 61,174 (1998); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,019 (1993); *Tennessee Gas Pipeline Co. (Tennessee)*, 52 FERC ¶ 61,257 (1990); *ANR Pipeline Co.*, 51 FERC ¶ 61,359 (1990); and *Texas Eastern Transmission Corp.*, 47 FERC ¶ 61,341 (1989).

However, it states that its existing customers will be protected because the lease capacity is incrementally priced and that its existing customers will not bear any expansion costs unless a future Commission determines that they should. Further, Algonquin contends that if the depreciation rate was dependent upon the term of the lease, Islander East would be subsidizing the use of the facility by future customers. It states that the lease was not designed to recover such an artificially high depreciation rate.

86. Upon reconsideration, we will grant rehearing on this issue and allow Algonquin to use its systemwide depreciation rate. This depreciation rate is consistent with the depreciation treatment the Commission has approved in other recent Algonquin expansion projects.<sup>40</sup> Although this depreciation rate does not match the shorter term of the proposed lease agreements, because the lease agreement is a property interest, Algonquin will need to file for NGA section 7 certificate authorization upon expiration of the lease agreement and before it can use the facility to provide any subsequent service. In that proceeding, the Commission can determine, based on Algonquin's proposed future use of the incremental capacity, the appropriate treatment of the future of the depreciation rate. However, we note that Algonquin will be financially liable for project costs and will not be able to shift any such costs to existing shippers if the proposed future use of the facilities is not fully subscribed when the lease agreement terminates.<sup>41</sup>

**b. Similarly Situated Shippers**

87. In the December 21 order, the Commission required that Algonquin offer the same type of service it is providing Islander East under the Lease Agreement to others that request a similar arrangement.<sup>42</sup> On rehearing, Algonquin requests that the Commission clarify that its obligation to offer similar terms to similarly situated parties does not obligate Algonquin to offer lease terms that do not recover Algonquin's cost of service.

88. Algonquin contends that the Commission misunderstood the lease payment when it found that the lease payment was not designed to recover return on the capital cost of the

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<sup>40</sup>Id.

<sup>41</sup>Id., see also Transcontinental Gas Pipe Line Corp., 97 FERC ¶ 61,094 at 61,486 (2001).

<sup>42</sup>We note that in the December 21 order we required that Algonquin provide similar arrangements to similarly situated shippers, in essence, this does not necessarily require that Algonquin make such service available to "shippers". As stated, the lease arrangement is a property interest that requires NGA section 7 certificate authorization. As such, this type of arrangement is only available to a natural gas company under the NGA.

proposed facilities, or that the lease payment does not recover income taxes. Algonquin claims that the lease payment was intended to recover all costs associated with the lease. It asserts that the lease payment "essentially" recovers Algonquin's cost of service over the 20-year lease term, including return on equity, debt cost, and federal and state income taxes.

89. The requirement that Algonquin provide similar arrangements to similarly situated shippers, in essence, does not necessarily require that Algonquin make such service available to "shippers". As stated, the lease arrangement is a property interest that requires NGA section 7 certificate authorization. As such, this type of arrangement is only available to a natural gas company under the NGA. While Algonquin contends that the lease payment essentially recovers its cost of service, based on information submitted by Algonquin, the first year levelized cost of service is \$4,854,724, while the annual lease payment is \$4,785,150.<sup>43</sup> It is this type of financial arrangement that Algonquin must provide another similarly situated party. However, Algonquin will bear financially liable for any project costs not covered by this type of lease and will not be permitted to shift any such costs to other customers.

c. Service on Leased Facilities

90. In the December 21 order, the Commission pointed out that at the expiration of the lease, Algonquin would need certificate authorization to use the capacity created by the proposed incremental facilities. On rehearing, Algonquin requests that the Commission clarify that Algonquin does not need certificate authorization to use the proposed facilities to provide open access service under its blanket certificate. Algonquin contends that, once constructed, the facilities will become an integrated part of Algonquin's system and that it should be able to make available to its Part 284 customers any of the additional capacity that is not being used by Islander East.

91. As stated, a lease of interstate pipeline capacity is an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline. As such, the lessee of interstate pipeline capacity is required to obtain appropriate NGA section 7(c) authorization to acquire the lease capacity. Once certificated, the capacity, in essence, belongs to the lessee. As such, any available capacity is subject to the capacity release requirements of the lessee's tariff. The lessor has relinquished its rights to use that capacity. Algonquin does not have any rights to use the leased capacity for interruptible service. In this proceeding, the authorization the Commission is issuing to Algonquin grants it authorization only to construct and operate the incremental facilities. It does not have certificate authorization to use that capacity to provide service, however, because the capacity will be leased to Islander East.<sup>44</sup> If Islander East chooses

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<sup>43</sup>Based on the figures in Attachment A, Algonquin essentially fails to recover approximately \$1,390,000 over the 20-year term of the lease.

<sup>44</sup>Similarly, when the Commission authorizes a lease agreement based on a

to release capacity, Algonquin would have to compete with all the other potential shippers bidding for that capacity under the provisions of Islander East's tariff. Algonquin can receive no preferential treatment in the acquisition of such capacity.

92. As stated in the December 21 order, because Islander East holds a certificate to acquire the capacity by lease, when Islander East discontinues its use of the capacity, it will need to file for a certificate to abandon the capacity and Algonquin will need to apply for a certificate to reacquire the capacity.

**d. Records for Cost and Revenue**

93. In the December 21 order, the Commission required that Algonquin include a provision in its tariff that would require that Algonquin maintain separate records for all the costs and revenues related to the Islander East lease. On rehearing, Algonquin contends that the tariff provision is not necessary and would impose unnecessary administrative burdens on Algonquin. It states that Algonquin's customers are protected from the cost of the lease by the fact that the lease service is priced incrementally. It argues that the customers' revenue responsibilities could only be affected by a rate proceeding subsequent to the in-service date of the proposed facilities. Algonquin states that since its current rates are subject to a moratorium and because no rate proceeding is imminent, the tariff provision would not provide any meaningful information.

94. Algonquin contends that its customers' interests would be more directly protected by a condition requiring that its accounting records segregate the cost of the proposed facilities. Algonquin states that it maintains separate records for the costs of its incrementally-priced expansion facilities. It claims that the leasehold transaction presents no special issues of cost segregation different from those presented by the typical incrementally priced expansion. Algonquin states that in any future rate proceeding the accounting data will be available on the basis of which the costs of service of the proposed facilities can be segregated from the cost of service used to derive Algonquin's rates.

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pipeline's existing capacity, the Commission requires that the lessor pipeline abandon that capacity and issues a certificate to the lessee pipeline to acquire that capacity. Once acquired, the lessor pipeline no longer has an interest in that capacity and can not use it to provide service on its system.

95. The Commission's intent behind requiring the tariff provision was to assure that Algonquin maintain separate records for all the costs and revenues related to the Islander East lease. That purpose can be accomplished by Algonquin's keeping accounting records of the separate costs. Accordingly, we will grant rehearing on this issue and revise our ruling in the December 21 order by requiring that Algonquin maintain separate and identifiable accounts for volumes transported, billing determinates, rate components, surcharges, and revenues associated with its negotiated rates. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate cases.

#### **D. Environmental Review**

96. On August 21, 2002, the Commission issued the Islander East Pipeline Project final EIS. The EPA published a notice of availability of the EIS in the Federal Register on August 30, 2002. Approximately 1500 copies of the EIS or Executive Summary were mailed to agencies, groups, and individuals on the mailing list. The EIS included a summary of all comments received on the draft EIS and responses to those comments. Based on information provided by Islander East and Algonquin and further developed by field investigations, literature research, alternative and route variation analyses, and contacts with Federal, state, and local agencies and individual members of the public, the EIS concludes that construction and operation of the proposed project will result in a limited adverse environmental impact. The EIS further concludes that if the project is constructed and operated as proposed by Islander East and Algonquin and in accordance with the recommended mitigation measures, it would be an environmentally acceptable action.

97. The final EIS evaluates alternatives to the proposed Islander East Project to determine whether they would be reasonable and environmentally preferable to the proposed action. The final EIS found that the ELI System Alternative, an alternative based on a modified version of Iroquois' ELI Project, was environmentally preferable because it has a shorter Long Island Sound crossing, avoids more shellfish leases, and would only have air quality and noise impacts onshore in Connecticut.<sup>45</sup>

98. Several parties and commentors urge the Commission to choose Iroquois' ELI Project over the Islander East Project if it determines the ELI Project is environmentally preferable. The policy and goals of NEPA, however, are supplementary to the Commission's mandate under the NGA. The Commission's primary obligation under the NGA remains the

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<sup>45</sup>The ELI System Alternative includes the proposed ELI Project facilities, including the Milford Compressor Station, the route for Long Island Sound and the onshore portions in New York. The ELI System Alternative would also include an additional 10,000 hp to Iroquois' Brookfield Compressor Station and 5.6 miles of pipeline lateral equivalent to the Calverton Lateral proposed by Islander East.

same. NEPA simply adds a secondary responsibility that mandates that the Commission consider the environment in carrying out its statutorily mandated duties.<sup>46</sup> Further,

NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental

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<sup>46</sup>See State of Louisiana v. FPC, 503 F.2d 844 at 876 (1974).

costs. . . . All that is required is that the agency "identify the reasonable alternatives to the contemplated action" and "look hard at the environmental effects of [its] decision."<sup>47</sup>

99. Islander East's application demonstrates that its proposed project will provide much needed competition and reliability that the ELI System Alternative and Iroquois' ELI Project cannot. As stated, the New York PSC prefers the Islander East Project because it will provide another source of delivery to Long Island. Moreover, the final EIS determines that Islander East's proposed project is an environmentally acceptable action. Therefore, we find that the public convenience and necessity requires that we approve Islander East's project.

100. Branford Land Trust contends that the Islander East pipeline is not needed to increase reliability of the pipeline infrastructure in eastern Long Island. Specifically, it argues that the system interconnects with the three pipeline companies in Connecticut<sup>48</sup> that could serve Long Island and make it unnecessary to construct the Islander East Pipeline. It asserts that damage to any of these three pipelines could be circumvented by routing the gas through the other two companies' lines. Branford Land Trust states that the only location where damage could disrupt gas transportation to Long Island by Iroquois' pipeline is the short distance between the Sheldon, Connecticut interconnection and where Iroquois' ELI Project branches from the existing Iroquois pipeline.

101. As stated, the eastern Long Island market is currently directly served by only one pipeline, Iroquois. First and foremost, any disruption in service from Iroquois' facilities in Connecticut and Long Island will have a major impact on the ability to continue certain natural gas and electric service in Long Island. Second, it would be difficult to determine what, if any, impact a disruption on Iroquois' system upstream of its Connecticut facilities will have on supplies intended to be delivered to Long Island. Rerouting capacity from other pipelines would be dependent upon available capacity on interconnecting pipelines and the feasibility of being

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<sup>47</sup>Midcoast Interstate Transmission v. FERC, 198 F.3d 960 at 967 (2000), citing, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 at 350 (1989) and Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 at 374 (D.C. Cir. 1999).

<sup>48</sup>Specifically, it refers to Iroquois, Algonquin, and Tennessee Gas Pipeline Co.



able to get that capacity for use on Iroquois' system. Moreover, getting the rerouted capacity to Long Island would also depend on Iroquois' shippers ability to contract for that capacity and to find other sources to replace the gas that was lost. The Islander East Project will provide a readily available alternative and additional source of gas for Long Island consumers. Therefore, we find that the Islander East pipeline, in addition to the existing Iroquois pipeline, is necessary to provide the Long Island market with alternatives in the event something happens to either pipeline.

102. Branford Land Trust also contends that the final EIS improperly dismissed consideration of the Cross Bay Pipeline Company (Cross Bay) Project as an alternative to Islander East. It argues that in that proceeding the Commission determined that the Cross Bay Project could be constructed with minimal environmental impacts because it would upgrade an existing pipeline between New Jersey and Long Island. Branford Land Trust claims that the fact that Cross Bay decided not to build the facility should not eliminate it from consideration.

103. In Cross Bay,<sup>49</sup> the Commission authorized the company to construct and upgrade facilities that would provide an additional 125,000 Dth per day of capacity to serve markets in New York City and Long Island. After the Commission issued the certificate, Cross Bay requested that the Commission vacate its certificate authorization. In a letter filed on December 7, 2001 in Docket No. CP00-412-000, Cross Bay stated that the tariff and rate provisions imposed in the order would carry long-term economic uncertainty on one of its members. Further, it explained that the market targeted by the Cross Bay Project did not materialize in the time frame anticipated.

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<sup>49</sup>Cross Bay Pipeline Co., 97 FERC ¶ 61,165 (2001), order vacating certificate, 98 FERC ¶ 61,080 (2002).

104. As noted in the final EIS, the planned capacity of the Cross Bay Project was about half of the volume proposed by Islander East and would need to be redesigned to be able to deliver the increased volumes.<sup>50</sup> Such a redesign would probably required more looping of the existing facility which would probably significantly change the impact of the proposed project. The final EIS determined that the Cross Bay Project was not a reasonable alternative because of the differences in proposed volumes and because the project was withdrawn. Even assuming, for argument sake, the Islander East market could replace the market targeted by the Cross Bay Project, the project was also withdrawn because the project sponsors were not willing to accept the tariff and rate conditions imposed upon the certificate authorization. We agree with the finding in the final EIS that the Cross Bay project is not a reasonable alternative that would warrant any further consideration.

105. The Commission has reviewed the information and analysis contained in the EIS regarding the potential environmental effect of the project. Based on our consideration of this information, we agree with the conclusions presented in the EIS and find that the Islander East Pipeline project, if constructed and operated in accordance with the recommended and proposed environmental mitigation measures, is environmentally acceptable. Therefore, we are including the environmental mitigation measures recommended in the final EIS as conditions to the authorizations issued to Islander East and Algonquin.<sup>51</sup>

106. Many parties, towns, agencies, and individuals filed comments and recommendations concerning the environmental impact of Islander East's proposed project. The final EIS discusses these comments. Below is a brief discussion of the major areas of concern.

107. Some commenters raised concerns about, among others things, worse-case scenarios involving earthquakes or potential run-away train derailments. Under NEPA, the Commission is required to prepare a detailed statement on the environmental impact of a proposed federal project.<sup>52</sup> However, NEPA does not require that all impacts be discussed in exhaustive detail. Only effects that are likely, foreseeable, or reasonable foreseeable need be discussed. The terms likely and foreseeable apply to a type of environmental impact that is likely to occur that a person of ordinary prudence would take it into account in reaching a decision.<sup>53</sup>

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<sup>50</sup>See final EIS at 4-7.

<sup>51</sup>The Appendix to this order lists the Environmental Conditions imposed on Islander East's certificate authorization.

<sup>52</sup>See 42 U.S.C. § 4332(2)(C)(i).

<sup>53</sup>See Sierra Club v. John O. Marsh Jr., 976 F.2d 763 at 767 (1992).

The final EIS analyzes the potential foreseeable impact of the proposed project. It does not address scenarios that are highly speculative and indefinite.<sup>54</sup>

### 1. Impact on Long Island Sound and Commercial Fishing

108. Islander East's proposed project will cross approximately 22.6 miles of Long Island Sound from the Connecticut to the Long Island Shorelines. In its original application, Islander East stated that it may use the jetting construction method in lieu of the subsea plow method, if a plow was not available. The jetting technique causes greater disturbance to sediments and also disperses sediments over a much larger volume of the water column than the subsea plow. However, subsequently, Islander East has committed to using the subsea plow method in the areas in Long Island Sound that it will not cross by horizontal directional drill (HDD). Islander East has committed to use HDD for the portions of the pipeline that run from the Connecticut shoreline into Long Island Sound and from Long Island Sound on to the shore in Long Island. HDD will minimize impacts to the shoreline and to the shell fish lease areas off of the Connecticut shore. The use of these two methods will significantly decrease the impact the proposed pipeline will have on Long Island Sound.

109. Islander East also conducted computer modeling of spoil mound erosion. The modeling was to determine the short- and long-term stability and the impact of a storm on the dredged material mounds created during the construction of the proposed pipeline if they are exposed. The final EIS reviewed the assumptions and inputs used for the model and have determined that they are appropriate. Additionally, the final EIS determined that the modeling effort adequately addresses the impacts to the sediment mounds from storm events.

110. On August 13, 2002, the Branford Land Trust filed a letter stating that Islander East's offshore sediment dispersion modeling is fragmented and limited and gives a dangerously incomplete picture of the likely consequences of Islander East's project. It questions the adequacy of the tidal vector, current directions, and sensitivity of the model. The Branford Land Trust also claims, among other things, that large amounts of sediment would be eroded onto near-shore shellfish beds during construction, and that the modeling fails to provide dimensions of plumes and conditions that may occur during a major storm event, particularly in the near-shore areas where the shellfish leases are found.

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<sup>54</sup> See Kleppe v. Sierra Club, 427 U.S. 390, 402 (1976).

111. As discussed in the final EIS, Islander East's modeling included site-specific current and wave data that captured a storm event whose magnitude is considered to be representative of an event with a recurrence interval of approximately 2 to 2.5 months.<sup>55</sup> The modeling included two typical northeasters. We agree with the conclusion of the final EIS that the modeling effort adequately addresses the impacts to the sediment mounds from a likely foreseeable storm event as required by NEPA.<sup>56</sup>

112. The Commission agrees, however, that the construction of the pipeline may impact near-shore areas if a non-typical storm event were to occur during construction. As discussed in the final EIS, sedimentation may cause mortality to oysters. A non-typical storm could result in greater sedimentation on near-shore areas that could impact the number of oysters that could be killed.<sup>57</sup> Any damages caused by the construction of the project are the responsibility of the pipeline company, regardless of whether the impacts were anticipated through modeling or occurred due to unexpected conditions. Therefore, we will require that Islander East determine additional near-shore areas that will need to be monitored to determine any damage that may result from additional sedimentation impacts.

113. In order to more adequately determine the near-shore area that should be monitored for potential sedimentation impacts from construction, we will add the following environmental conditions. First, in a new Environmental Condition No. 54, we will require that Islander East run the offshore sedimentation model on the shallower sections of the spoil mounds (at the northern portion of the HDD transition basin), prior to submitting the offshore monitoring

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<sup>55</sup> See final EIS at 3-51.

<sup>56</sup> See supra n. 49.

<sup>57</sup> We note, however, that because clams are vertically mobile in sediments and are not killed by smothering, underestimates from the model would have no consequence on the discussion of impacts to clams that were described in the final EIS. See final EIS at 3-70.

plan, in order to determine additional near-shore areas that may require monitoring for sedimentation impacts. Islander East should file the results of the revised modeling along with the offshore monitoring plan required in Environmental Condition No. 23.

114. Second, in a new Environmental Condition No. 55, we will require that if monitoring results show that the erosion and deposition exceed either the depth of sediment deposition or the areal extent of coverage that was estimated by Islander East's modeling, Islander East will be responsible for mitigation of the additional effects. Such mitigation could include clam and oyster seeding or replacement of oyster habitat, sufficient or compensate for the unpredicted impacts. Mitigation should be determined through consultation with the lease holder and/or appropriate Federal or state agency.

115. Commercial fishing, including shellfishing, is an import industry off the Connecticut shoreline. The proposed Islander East Project will cross seven shellfish lease areas. Of these, two are unlisted shellfish beds, and four would be avoided by using HDD crossing methods at the Connecticut shore. One shellfish lease area would be directly disturbed by trench excavation and 25 shellfish lease areas are located within 0.25 mile of the pipeline route and may be subject to potential sedimentation impacts resulting from construction. Three of these adjacent shellfish lease areas would not be crossed by the pipeline, but are located within the anchor corridor associated with the construction barges.

116. Islander East has negotiated a crossing/settlement agreement with the leaseholder of the lease directly impacted by the trench excavation at the exit hole of the HDD. It has also executed agreements with the three leaseholders whose leases are located within the anchor corridor. The agreements, among other things, specify payments for: (1) pre-construction harvesting of shellfish within the affected areas; (2) coordination of shellfish harvesting activities in the anchor corridor area during pipeline construction; (3) damages during and immediately following construction; and (4) reseeding the beds with seed shellfish following construction (if desired by the leaseholder).

117. The final EIS also lists other mitigation measures Islander East will implement to minimize the impact of the project on the commercial fishing operations, including, but not limited to, establishing funds to reimburse lobstermen for lost fishing gear.<sup>58</sup> Additionally, to avoid or minimize impacts on commercial fishing, Islander East intends to construct the offshore pipeline during winter months and to adhere to specific construction timing restrictions established by state and Federal authorities to minimize the impact to the commercial fishery operations. The Commission believes that these measures would effectively reduce and minimize impacts on commercial fishing activities to an acceptable level.

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<sup>58</sup> See final EIS at 3-106.

2. Impact on Land Trust Properties and the Central Pine Barrens

118. The proposed Islander East Project will cross or be located near several special land use areas, including a school yard and several public land trust properties, including the Branford Land Trust property and the Central Pine Barrens of New York. The final EIS discusses numerous alternatives and variations that were analyzed and, when appropriate, adopted to minimize the impact on these areas.<sup>59</sup> Further, the Environmental Conditions discussed in the final EIS and attached in the Appendix to this order require that Islander East continue to consult with the North Haven Land Trust, the Branford Land Trust, and the Central Pine Barrens Commission concerning mitigation measures and revised construction and restoration plans before commencing construction of the facilities. Islander East is required to file any revisions with the Director of the Office of Energy Projects (OEP) for review and written approval before it may commence construction of the subject facilities.

119. The final EIS recommends a route alternative to Islander East's proposed Calverton Lateral Route that will require that the pipeline cross an additional 16 acres of the Central Pine Barrens' Core Preservation Area (CPA)(Calverton State Route 25 Alternative).<sup>60</sup> The Commission has adopted this alternative because it will reduce the number of residences within 50 feet of the proposed pipeline. Additionally, the alternative route will parallel an existing state highway.

120. In comments filed in response to the final EIS, the Pine Barrens Society states that Islander East's proposed Calverton Lateral Route would be preferable to the Calverton State Route 25 Alternative because less CPA of the Central Pine Barrens would be crossed with the originally proposed route. It states the draft EIS dismissed the Calverton State Route 25 Alternative and recommended Islander East's proposed Calverton Lateral Route as the more environmentally sensible choice. The Pine Barrens Society contends that the Commission needs to further elaborate the reasons behind the change in position from the draft EIS to the final EIS

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<sup>59</sup>Final EIS Section 4.

<sup>60</sup>The 102,500 acre Central Pine Barrens was established in 1993 as a forest preservation area and contains the largest remnant of forest on Long Island.

because the circumstances have not changed. Further, it asserts that the Calverton State Route 25 Alternative would include wetlands and locations with New York State Department of Environmental Conservation (NYSDEC) confirmed state listed endangered species and require additional tap valves, aboveground facilities and access roads in the CPA.

121. Based on the information available at the time the draft EIS was issued, there was one existing residence within 50 feet of the proposed Calverton Lateral Route and two within 50 feet of the Calverton State Route 25 Alternative.<sup>61</sup> However, because of subsequent subdivision development, aerial photographs submitted by Meadowcrest developer on June 28, 2002, indicated that there are now eleven residences within 50 feet of the proposed Calverton Lateral Route.<sup>62</sup> Further, in a response to the Pine Barrens Society's comments, Meadowcrest states that there are now 15 completed homes and another 36 that will be constructed by the close of 2002. In light of these changed circumstances, the final EIS determined that the Calverton State Route 25 Alternative would be the preferred route. As stated in the final EIS, the alternative was identified to minimize the length of the lateral, maximize the use of existing rights-of-way, and minimize impacts to new residential areas.<sup>63</sup> The Commission prefers pipeline routing along existing road or utility rights-of-way, whenever possible, over creating a new greenfield pipeline right-of-way, especially through residential areas.

122. The Calverton State Route 25 Alternative does not cross any identified National Wetland Inventory mapped wetlands, and the area of species habitat along the alternative would be avoided by the use of an HDD crossing of Horn Pond and the surrounding area. While a tap valve and access road would be required in the CPA, by routing the lateral along State Route 25, the permanent right-of-way would abut the road right-of-way and avoid further fragmentation of

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<sup>61</sup>During an October 16, 2001 Commission Staff field visit the area was an open field.

<sup>62</sup>The final EIS also notes that there are an additional eight planned residence in the Spring Meadow subdivision.

<sup>63</sup>Final EIS at 4-26 - 4-29.

the CPA. This would avoid the unfragmented areas identified by the Pine Barrens Society as being located north and south of State Route 25, since activities would be limited to a 60-foot-wide corridor adjacent to the road. Accordingly, we agree with the conclusions in the final EIS concerning the Calverton State Route 25 Alternative.

123. Since both Iroquois' ELI Project and Islander East's proposed project use the same route on Long Island, the Pine Barrens Society request that the Commission review the feasibility of Islander East and Iroquois operating a jointly owned single pipeline once it hits the mainland in Long Island. The draft EIS for the ELI Project and the final EIS for Islander East discuss the impact of constructing a single 12-mile pipeline instead of dual pipelines. While the two EISs state that a one pipeline alternative on Long Island Sound would have some environmental benefits, the proposed and recommended mitigation measures would significantly reduce the impact of the two pipelines.<sup>64</sup>

124. A one pipeline alternative requires extensive cooperation between the parties and a willingness of the parties to enter into a coordinated business arrangement. To date, neither party has indicated any willingness to enter into negotiations to attempt to coordinate a workable arrangement to construct a one-pipeline alternative. However, should both projects receive final certificates,<sup>65</sup> the project sponsors might find it beneficial to coordinate their efforts concerning the proposed pipelines located onshore on Long Island.<sup>66</sup> For example, the pipelines might want to consider a lease arrangement

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<sup>64</sup> ELI Project Draft EIS at 4-19 and Islander East Project final EIS at 4-11.

<sup>65</sup> According to Islander East's proposed construction schedule, it does not intend to commence construction onshore on Long Island until May 2003.

<sup>66</sup> After an initial protest by ANR Pipeline Company (ANR) against Guardian



involving a single pipe, as such arrangements have the potential to reduce the cost of a project because of the reduced amount of construction involved. Accordingly, we encourage Islander East and Iroquois to explore potential mutually beneficial arrangements that could minimize the potential impact on the Long Island Pine Barrens.

### 3. Residential and Commercial Areas

125. As approved, approximately 83 percent of the proposed pipeline either overlaps or is adjacent to existing pipeline, powerline, railroad, and road rights-of-way. However, there are 41 existing residences within 50 feet of the construction work areas, primarily in Connecticut. Approximately 20 of these residences are located within 25 feet of the construction work areas, including four residences within or adjacent to the proposed work area. In addition, 15 existing commercial/industrial buildings are located within 50 feet of the construction work areas. Twelve of these are within 25 feet of the construction work areas, including seven buildings within or adjacent to the proposed work areas. The pipeline would cross two planned commercial developments and the Calverton Lateral would cross one planned residential development, where 11 residences could potentially be built within 50 feet of the pipeline construction work areas before commencement of project construction.

126. During the EIS process, Islander East made several minor route modifications to address, among other things, landowner concerns. We note that during the easement negotiation process, Islander East had the flexibility to work with the affected landowners and make minor changes, subject to subsequent approval, to site the pipeline in a more agreeable area on that landowner's property.

127. Islander East proposes to reduce the temporary construction impacts to residential- and commercial areas by avoiding removal of trees and landscaping as much as possible; developing site-specific construction plans for residences within 25 feet of the work area;

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Pipeline Company's (Guardian) proposed pipeline in Illinois and Wisconsin, ANR agreed to lease facilities to Guardian that would interconnect ANR's facilities with the proposed Guardian pipeline and replace 0.17 mile of pipeline with 0.8 mile of pipeline would disturb 10 acres less of primarily agricultural land. See Guardian Pipeline Co., 99 FERC ¶ 61,201 (2002).

restoring all lawns and landscaping promptly after backfilling; fencing the edge of the construction area in residential areas; controlling construction-related dust; coordinating road closures with nearby businesses and law enforcement agencies; attempting to complete pipeline installation across closed roads within 24 hours; establishing temporary bridges or other by-passes on small roads and driveways; and, keeping the roads clean of mud and soil from construction equipment and vehicles.

128. To further address and resolve potential landowner concerns, as discussed in the final EIS, we will require that Islander East establish a landowner complaint resolution procedure and report all landowner complaints in its biweekly progress report to the Commission. Additionally, we will require that Islander East provide each landowner with clear and simple directions for identifying and resolving their environmental mitigation problems or concerns.

#### 4. Other Final EIS Comments

##### a. Cultural Resources

129. Several parties and individuals filed comments to the final EIS.<sup>67</sup> The Town of North Branford (North Branford) states that specific conclusions in the final EIS as it pertains to the proposed pipeline in North Branford is flawed and the Commission should not issue a certificate to Islander East until it has completed its "due diligence" in the proposed pipeline route. First, it contends that further investigation is needed to determine the impact of the project on cultural resources in North Branford. It states that it appears that Islander East skewed its investigation by testing areas that inaccurately extrapolate that there is no cultural or historical significance. North Bradford questions how the route of the pipeline can be changed if additional testing finds items of cultural, historical, or archeological significance.

130. Section 106 of the National Historic Preservation Act (NHPA) does not require that the Commission delay issuing a certificate until the required investigation and report is completed.<sup>68</sup> Environmental Condition No. 43 requires

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<sup>67</sup>This order only addresses comments filed on or before September 13, 2002.

<sup>68</sup>See City of Grapevine, Texas v. DOT, 17 F.3d 1502 (D.C. Cir. 1994). In that case, the Federal Aviation Administration (FAA) approved a proposed runway before completion of the review process required by the National Historic Preservation Act (NHPA). To ensure compliance with the NHPA, the FAA conditioned its approval of the runway upon completion of the NHPA review. The court rejected a challenge to the validity of this approach, concluding that "because the FAA's approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA." Id. at 1509.